

Tribal Written Comments and Reclamation Responses  
Draft Indian Policy – NIA P10

| Tribe                        | Section | Comment <sup>1</sup>  | Response  | Action           |
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| Colorado River Indian Tribes | General | Reclamation is obligated to deliver to us our present perfected rights to water from the Colorado River. The trust responsibility requires that you protect these trust assets from interference by others and work with us to receive the full benefit of our rights. Reclamation works with the States in the Colorado River Basin to protect their water and to account for their water in ways that are not available to Tribes and not easily adapted to reserved water rights. The Manual should include a process for Reclamation to work with tribes to develop this flexibility for tribal water rights.   | We share the Tribes' concerns but the policy by its nature is very general. Reclamation's NEPA Manual contains the procedures that accomplish what the Tribes are requesting.   | None.            |
| Jicarilla Apache Nation      | 5.B.    | <p>Draft Policy Section 5B should be revised to clarify the requirements of "meaningful consultation" and "matters of mutual interest."</p> <p>Section 5B of the Draft Policy states that "Reclamation will pursue meaningful and proactive consultation, consistent with applicable laws and policy, with Indian tribal governments on matters of mutual interest...."</p> <p>Draft Policy § 5B. This section should be revised to clarify that meaningful and proactive consultation means tribal consultation <i>well in advance</i> with tribal representatives who possess clear authority to present tribal views to decision makers from the Bureau of Reclamation. As a practical matter, there appears to be a serious disconnect regarding where the actual consultation activity occurs. The Nation was recently made aware of an area representative at Reclamation that has not consulted or communicated with the Nation on issues related to water and water resource infrastructure. It is unclear, at a regional and local level, who serves as the point-of-contact for</p> | We agree generally with the comments concerning the consultation process and how it should occur. However, the policy is intentionally general and the details about consultation are provided elsewhere. A footnote will be added at the end of section 5.B., stating that additional information about consultation can be found in Reclamation's <i>Protocol Guidelines: Consulting with Indian Tribal Governments</i> (issued February 3, 1998, revised February 9, 2001, and reissued September 21, 2012). This guidance is posted on Reclamation's internet site at <a href="http://www.usbr.gov/native/policy/protocol_guidelines.pdf">http://www.usbr.gov/native/policy/protocol_guidelines.pdf</a> . | Insert footnote. |

<sup>1</sup> The comments are verbatim, as submitted.

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|                           |         | <p>Reclamation staff, tribal governments, and other parties interested in the consultation process. Also, this section should provide that public informational meetings and written invitations to consult do not amount to meaningful and proactive government-to-government consultation.</p> <p>The Draft Policy should be revised to identify activities that are appropriate for consultation. The Draft Policy currently reads that Reclamation will pursue consultation with Indian tribal governments on “matters of mutual interest.” Draft Policy § 5B. This language must be revised to specify the processes that Reclamation will use to properly identify which “matters of mutual interest” that affect tribal interests require consultation. The Draft Policy should also explain with specificity the mechanisms for identifying matters for consultation with Indian tribes. Without such specificity, it is unclear how Reclamation will make its determinations about whether to consult.</p> |   |                  |
| Jicarilla Apache Nation   | 5.B.    | <p>Draft Policy Section 5.B. should be revised to include and explain the consultation process.</p> <p>Section 5B of the Draft Policy should be revised to include a consultation process and to require written notice of the analysis and conclusion of each stage of the consultation process. For example, under the U.S. Environmental Protection Agency’s Policy on Consultation and Coordination with Indian Tribes, there are clear standards from EPA on what the consultation process entails, including defining the what, when and how of consultation. EPA also designates specific EPA personnel responsible for serving as consultation points of contact in order to promote consistency in, and coordination of, the consultation process; and establishes a management oversight and reporting structure that will ensure accountability and transparency.</p>  | We agree generally with the comments concerning the consultation process and how it should occur. However, the policy is intentionally general and the details about consultation are provided elsewhere. A footnote will be added at the end of section 5.B., stating that additional information about consultation can be found in Reclamation’s <i>Protocol Guidelines: Consulting with Indian Tribal Governments</i> (issued February 3, 1998, revised February 9, 2001, and reissued September 21, 2012). This guidance is posted on Reclamation’s internet site at <a href="http://www.usbr.gov/native/policy/protocol_guidelines.pdf">http://www.usbr.gov/native/policy/protocol_guidelines.pdf</a> . | Insert footnote. |
| Southern Ute Indian Tribe | General | While the Tribe maintains a good working relationship with Reclamation and looks forward to continued joint   | The requirements in the Reclamation Manual are mandatory for Reclamation employees.   | None.            |

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|                           |         | efforts to protect and benefit from our tribal trust assets, there have been several occasions over the years when it is clear that although Reclamation acknowledges its trust responsibility, it does not clearly understand what it means. Thus, in order to ensure Reclamation fulfills its trust obligation, the terms of the Indian policy should be mandatory.  |   |                          |
| Southern Ute Indian Tribe | 3.D.    | The first sentence in ¶ 3(D) should be revised as follows: “The term ‘Indian sacred sites’ means any <del>specific, discrete, narrowly</del> delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative . . . .”   | It would be problematic to have a definition that is different from the definition that is provided in EO 13007, Indian Sacred Sites. The definition in the policy tracks the language in the EO.   | None.                    |
| Southern Ute Indian Tribe | 3.F.    | The first sentence in ¶ 3(F) should be revised as follows: “The terms ‘Indian trust asset or trust resource’ mean a legal interest in land, water, minerals, funds, rights, or other property, <u>including the associated Reclamation facilities integral to the use, delivery, operation and management of the Indian trust asset</u> , that have been reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and EOs and held by the United States in trust for an Indian tribe or Indian individual, or held by an Indian tribe or Indian individual subject to a restriction on alienation imposed by the United States.” | We are not aware of any situations where there is a legal interest in a Reclamation facility that would make it an Indian trust asset or trust resource. Reclamation’s facilities are not held by the United States in trust or subject to a restriction on alienation imposed by the United States. They are federal assets. Congress occasionally has directed Reclamation to construct certain facilities that would be held in trust; however, in those instances the facilities are transferred out of Reclamation’s control after the project has been substantially completed. | None.                    |
| Southern Ute Indian Tribe | 4.A.    | Paragraph 4(A) should be revised as follows: “The Commissioner is responsible for promoting and maintaining Reclamation’s Native American Program and ensuring that Reclamation upholds its <u>trust</u> responsibilities to Indian tribes.  | Emphasizing only the trust responsibility is too narrow. The Commissioner is responsible for ensuring that Reclamation upholds <u>all</u> of its responsibilities to Indian tribes that arise under applicable laws, regulations, policies, and court decisions, including the trust responsibility.<br><br>The section will be revised to read: “The Commissioner is responsible for promoting and maintaining Reclamation’s Native American Program and ensuring that Reclamation upholds all of its responsibilities to Indian tribes.”  | Insert revised language. |
| Southern Ute Indian Tribe | 4.B.(6) | Paragraph 4(B)(6) should be revised as follows: “ <del>offering providing mandatory</del> training to Reclamation managers and staff for the purpose of improving Reclamation’s effectiveness in working with Indian tribes.”  | Reclamation is not required by law or policy to provide mandatory training to Reclamation managers and staff on the subject of working with Indian tribes, and it is inappropriate to create such a requirement through the Reclamation Manual.   | Insert revised language. |

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|                               |         |  | This comment will be partially addressed by substituting the word “offering” with “providing.”  |                          |
| Southern Ute Indian Tribe     | 5.B.    | The first sentence in ¶ 5(B) should be revised as follows: “ <u>As soon as there is a proposed action</u> , Reclamation will pursue meaningful and proactive consultation, consistent with applicable laws and policy, with Indian tribal governments on matters of mutual interest, including but not limited to the protection of Indian trust assets, Indian sacred sites, and Indian cultural resources.”  | We agree generally with the comments concerning the consultation process and how it should occur. However, the policy is intentionally general and the details about consultation are provided elsewhere. A footnote will be added at the end of section 5.B., stating that additional information about consultation can be found in Reclamation’s <i>Protocol Guidelines: Consulting with Indian Tribal Governments</i> (issued February 3, 1998, revised February 9, 2001, and reissued September 21, 2012). This guidance is posted on Reclamation’s internet site at <a href="http://www.usbr.gov/native/policy/protocol_guidelines.pdf">http://www.usbr.gov/native/policy/protocol_guidelines.pdf</a> . | Insert footnote.         |
| Southern Ute Indian Tribe     | 5.C.(2) | Paragraph 5(C)(2) should be revised as follows: “Reclamation will actively support and participate in Interior’s Indian water rights negotiation and implementation activities, as it works to resolve the water rights claims of Indian tribes through negotiated settlements, <u>if feasible</u> , rather than litigation, <del>when feasible</del> .”   | The comment is accepted.  | Insert revised language. |
| Kaibab Band of Paiute Indians | General | The Indian Policy was drafted exclusively by Reclamation without input or consultation with the Indian tribes. Tribes have knowledge and experience that should have informed Reclamation about what to include in the Indian Policy that directly affects the tribes. The long list of laws, regulations, executive orders, and memoranda listed as a proposed Appendix A to the new Indian Policy counsel against developing these documents before hearing from tribes about their concerns. Government-to-government consultation requires a more meaningful dialogue much earlier in the process not just a public comment process after the policies, directives and standards are prepared. The Indian Policy does not address how Reclamation will include tribes in the future. This is a major shortcoming that should be addressed. | The policy is not a new document and we did not feel that it was necessary to consult with tribes prior to converting the policy into the format that is required for the Reclamation Manual.   | None.                    |
| Kaibab Band of Paiute Indians | 3.D.    | The first sentence in ¶ 3(D) should be revised as follows: “The term ‘Indian sacred sites’ means any <del>specific, discrete, narrowly</del> delineated location on  | It would be problematic to have a definition that is different from the definition that is provided in EO 13007, Indian Sacred Sites. The definition in the policy tracks the   | None.                    |

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|                               |         | Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative . . . .”   | language in the EO.   |                          |
| Kaibab Band of Paiute Indians | 3.F.    | The first sentence in ¶ 3(F) should be revised as follows: “The terms ‘Indian trust asset or trust resource’ mean a legal interest in land, water, minerals, funds, rights, or other property, <u>including the associated Reclamation facilities integral to the use, delivery, operation and management of the Indian trust asset</u> , that have been reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and EOs and held by the United States in trust for an Indian tribe or Indian individual, or held by an Indian tribe or Indian individual subject to a restriction on alienation imposed by the United States.” | We are not aware of any situations where there is a legal interest in a Reclamation facility that would make it an Indian trust asset or trust resource. Reclamation’s facilities are not held by the United States in trust or subject to a restriction on alienation imposed by the United States. They are federal assets. Congress occasionally has directed Reclamation to construct certain facilities that would be held in trust; however, in those instances the facilities are transferred out of Reclamation’s control after the project has been substantially completed. | None                     |
| Kaibab Band of Paiute Indians | 4.A.    | Paragraph 4(A) should be revised as follows: “The Commissioner is responsible for promoting and maintaining Reclamation’s Native American Program and ensuring that Reclamation upholds its <u>trust</u> responsibilities to Indian tribes.  | Emphasizing only the trust responsibility is too narrow. The Commissioner is responsible for ensuring that Reclamation upholds <u>all</u> of its responsibilities to Indian tribes that arise under applicable laws, regulations, policies, and court decisions, including the trust responsibility.<br><br>The section will be revised to read: “The Commissioner is responsible for promoting and maintaining Reclamation’s Native American Program and ensuring that Reclamation upholds all of its responsibilities to Indian tribes.”  | Insert revised language. |
| Kaibab Band of Paiute Indians | 4.B.(6) | Paragraph 4(B)(6) should be revised as follows: “ <del>offering</del> <u>providing mandatory</u> training to Reclamation managers and staff for the purpose of improving Reclamation’s effectiveness in working with Indian tribes.”   | Reclamation is not required by law or policy to provide mandatory training to Reclamation managers and staff on the subject of working with Indian tribes, and it is inappropriate to create such a requirement through the Reclamation Manual.<br><br>This comment will be partially addressed by substituting the word “offering” with “providing.”   | Insert revised language. |
| Kaibab Band of Paiute Indians | 5.B.    | The first sentence in ¶ 5(B) should be revised as follows: “ <u>As soon as there is a proposed action</u> , Reclamation will pursue meaningful and proactive consultation, consistent with applicable laws and policy, with Indian tribal governments on matters of mutual interest, including but not limited to the protection of Indian trust assets, Indian sacred sites,  | We agree generally with the comments concerning the consultation process and how it should occur. However, the policy is intentionally general and the details about consultation are provided elsewhere. A footnote will be added at the end of section 5.B., stating that additional information about consultation can be found in Reclamation’s <i>Protocol Guidelines: Consulting with Indian</i>  | Insert footnote.         |

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|   |         | and Indian cultural resources.”  | <i>Tribal Governments</i> (issued February 3, 1998, revised February 9, 2001, and reissued September 21, 2012). This guidance is posted on Reclamation’s internet site at <a href="http://www.usbr.gov/native/policy/protocol_guidelines.pdf">http://www.usbr.gov/native/policy/protocol_guidelines.pdf</a> . |                          |
| Kaibab Band of Paiute Indians                       | 3.C.    | The definition of Trust Assets in paragraph 3(F) lists land, water, funds, and other resources as trust assets, however, in paragraph 5(C) Reclamation’s responsibility to protect trust assets is limited to Reclamation activities. Reclamation has a duty to protect tribal trust assets from <b>all</b> interference and adverse impacts not just those resulting from activities within Reclamation. In addition, mitigation or compensation, identified as remedies in paragraph 5(C)(1) are never adequate remedies for failure to protect trust assets. Active protection of trust assets should always be required.   | We understand the tribe’s concern; however, Reclamation has a duty to protect trust assets form interference when Reclamation has the authority to act.   | None.                    |
| Kaibab Band of Paiute Indians                       | 5.C.(2) | Paragraph 5(C)(2) should be revised as follows: “Reclamation will actively support and participate in Interior’s Indian water rights negotiation and implementation activities, as it works to resolve the water rights claims of Indian tribes through negotiated settlements, <u>if feasible</u> , rather than litigation, <del>when feasible</del> .”   | The comment is accepted.  | Insert revised language. |
| Ten Tribe Partnership (Colorado River Basin Tribes) | General | It is distressing to tribal leaders that the new sections of the Reclamation Manual addressing Indian Policy and the proposed Directive and Standards for contracting with Tribes were drafted exclusively by Reclamation without input or consultation with the tribes. The Tribes have knowledge and experience that should have informed BoR about what to include in the Manual that directly affects them. The long list of laws, regulations, executive orders and memoranda listed as a proposed Appendix A to the new Policy counsel against developing these documents before hearing from the Tribes about their concerns. Consultation requires a more meaningful dialogue much earlier in the process not just a public comment process after the policies, directives and standards are prepared. | The policy is not a new document and we did not feel that it was necessary to consult with tribes prior to converting the policy into the format that is required for the Reclamation Manual.   | None.                    |
| Ten Tribe Partnership                               | 5.C.    | The definition of Trust Asset lists water, however in Section 5(C) Reclamation’s responsibility is limited to  | We understand the Tribes’ concern; however, Reclamation has a duty to protect trust assets form interference when   | None.                    |

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| (Colorado River Basin Tribes)                       |         | Reclamation activities. Reclamation has a duty to protect tribal water rights and other trust assets from <b>all</b> interference and adverse impacts not just those resulting from activities within your agency. In addition, mitigation or compensation is never an adequate remedy for failure to protect trust assets.   | Reclamation has the authority to act.  |                  |
| Ten Tribe Partnership (Colorado River Basin Tribes) | General | It is not clear from this policy that Reclamation understands the pervasiveness of Indian water rights and Indian water claims in the western United States. It is unlikely that a Reclamation initiative, program or project can be proposed that does not impact an Indian trust asset and thereby trigger the obligation to consult. For example, Reclamation worked extensively with the states and non-Indian stakeholders to develop the Colorado River Basin Study but did not inform or include tribes in the design and implementation of the study. This created a skewed view of the basin supply that includes unused tribal water rights and tribal claims and a skewed view of the basin demand that does not include future tribal water uses. We do not yet know what effect this will have on tribes. The tribal basin study will help alleviate our concerns. | By issuing the policy and informing staff about their responsibilities to Indian tribes, Reclamation is seeking to avoid situations similar to what the Tribes experienced during the Colorado River Basin Study.  | None.            |
| Ten Tribe Partnership (Colorado River Basin Tribes) | General | Reclamation was a significant participant in the preparation of Minute 319 issued by the International Boundary and Water Commission. Environmental organizations and other non-Indian stakeholders were involved in the process; however, the lower basin tribes with present perfected water rights in the affected part of the River were not included. This is a breach of the Reclamation Policy and the obligation to protect trust assets.   | By issuing the policy and informing staff about their responsibilities to Indian tribes, Reclamation is seeking to avoid situations similar to what the Tribes experienced during the preparation of Minute 319.   | None.            |
| Ten Tribe Partnership (Colorado River Basin Tribes) | General | The Policy that is circulated for our comments does not address how Reclamation will include tribes in the future. This is a major shortcoming of the Draft Policy.   | We agree generally with the comments concerning the consultation process and how it should occur. However, the policy is intentionally general and the details about consultation are provided elsewhere. A footnote will be added at the end of section 5.B., stating that additional information about consultation can be found in Reclamation's <i>Protocol Guidelines: Consulting with Indian Tribal Governments</i> (issued February 3, 1998, revised February 9, 2001, and reissued September 21, 2012). This | Insert footnote. |

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|   |                      |  | guidance is posted on Reclamation’s internet site at <a href="http://www.usbr.gov/native/policy/protocol_guidelines.pdf">http://www.usbr.gov/native/policy/protocol_guidelines.pdf</a> .  |                          |
| Ten Tribe Partnership (Colorado River Basin Tribes) | General              | The Draft Policy is proposed to restate and incorporate in the Reclamation Manual Reclamation’s previous memorandum <i>Indian Policy of the Bureau of Reclamation</i> (Feb. 25, 1998) (1998 Policy). The 1998 Policy expressly recognizes that Indian tribes have “inherent powers of tribal sovereignty and self-government.” 1998 Policy, first bullet. The Draft Policy, while including an expansive list of sources of the “unique” relationship between the United States and Indian tribes, fails to reiterate this essential fact. Draft Policy, ¶ 1. The CRIT encourages Reclamation to include an express statement recognizing the inherent sovereignty of Indian tribes, including the powers of self-government and self-determination, in the Indian Policy included in the Reclamation Manual.  | We agree that the original language that was included in the policy that issued in 1998 is important. The original language was reformatted to meet the requirements of the Reclamation Manual and is included, in part, in sections 1 and 5.A.     | None.                    |
| Ten Tribe Partnership (Colorado River Basin Tribes) | 3.G.                 | The Draft Policy also adds a section devoted to definitions. The CRIT believes it is important to place Reclamation’s trust responsibility, described in the definition “Indian Trust Responsibility or Trust Responsibility,” in its larger context. Accordingly, the CRIT proposes the following modification to the definition: <b>G. Indian Trust Responsibility or Trust Responsibility.</b> The terms “Indian trust responsibility” or “trust responsibility” mean the role of Reclamation in carrying out the Federal trust responsibility, including Reclamation’s obligation to protect and maintain Indian trust assets or trust resources. This responsibility requires Reclamation to take actions necessary under applicable laws and policies to protect Indian trust assets or trust resources. | This comment will be accommodated, in part, by modifying the definition to read: The terms “Indian trust responsibility or trust responsibility” mean the United States’ obligation to protect and maintain Indian trust assets or trust resources. | Insert revised language. |
| Ten Tribe Partnership (Colorado River Basin Tribes) | 3.E., 3.F., and 3.H. | As a stylistic matter, the Draft Policy, in several of the definitions (including the definition discussed above), includes two distinct but similar terms in one set of quotation marks. (Draft Policy, ¶¶ 3.E, 3.F and 3.H). It would appear to be more appropriate to indicate, as we have done above, that the Policy may use either of the terms and they will have the same definition. In most cases the two terms will not be used conjunctively;  | Editorial comment – no response required.<br><br>The terms “Indian trust assets” and “trust resources” will be used consistently though out the policy.   | Insert revised language. |



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|   |            | however, the Draft Policy does use the phrase “Indian trust assets or trust resources,” despite Reclamation's statement in Draft Policy footnote 2 that for most purposes Reclamation finds “Indian trust assets” and “trust resources” to be functionally equivalent. Further, the use of the singular “Indian trust asset” in the title and definition at ¶ 3.F appears to be a typographical error.  |   |       |
| Ten Tribe Partnership (Colorado River Basin Tribes) | Appendix A | Finally, the Draft Policy includes an Appendix setting out the “major laws, regulations, executive orders and memoranda, Departmental Manual chapters, and policies” cited as authority for Reclamation's responsibilities to Indian tribes. The CRIT suggests the addition of the American Indian Trust Fund Management and Reform Act of 1994, Pub. L. 103-412 (codified at 25 U.S.C. §§ 401[4001] <i>et seq.</i> , and amending 25 U.S.C. §162a). The Act is cited as authority for 303 DM 2, which is included in the Appendix. The Act was described in Secretarial Order 3215 as “the most comprehensive and informative legislative statement of Secretarial duties in regard to the trust responsibility of the United States.” (S.O. 3215 was superseded by incorporation in the Department Manual at 303 DM 2.) | The American Indian Trust Fund Management and Reform Act of 1994 is not applicable to Reclamation. Reclamation does not manage trust funds and is not expressly identified in the Act with trust fund management responsibilities. However, 303 DM 2 – Principles for Managing Indian Trust Assets is included in Appendix A because it outlines broader trust responsibilities regarding lands and natural resources, which are applicable to Reclamation. | None. |